85-479

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

ANDRES SERRANO MEDINA

PETITIONER

VS.

THE UNITED STATES OF AMERICA,
COMMANDING OFFICER OF THE NAVAL STATION,
ROOSEVELT ROADS, PUERTO RICO
ANTILLES CONSOLIDATES SCHOOL SYSTEM

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SERRANO MEDINA
PETITIONER
VS

UNITED STATES OF AMERICA

THE COMMANDING OFFICER, NAVAL STATION, ROOSEVELT ROADS, PUERTO RICO

ANTILLES CONSOLIDATED SCHOOL SYSTEM
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Andres Serrano Medina submits his case to this Supreme Court and respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the First Circuit.

I. QUESTIONS PRESENTED FOR REVIEW

Petitioner presents for review basic, fundamental questions of the conflict in rights between the authority of a military commanding officer to exclude civilians from his command, and the constitutional rights of the excluded civilians.

1. If a commanding officer bars a civilian from entering his command area, is his action within the jurisdiction of the federal courts when the affected civilian contests the bar order?
2. If the federal courts have jurisdiction to hear the controversy, can the court review the decision?
3. If the court can review the decision, must the review comply with "due process"?
4. If the court finds the decision of the commanding officer without support in the evidence, can the court award damages?
5. If the court finds the decision of the commanding officer without support in the evidence, can the court order the commanding officer to admit the civilian to the base?
6. If the criteria exists that only a "patently arbitrary and capricious" order can be reviewed by the court, how can the court determine if a decision were patently arbitrary or capricious except by hearing evidence?

These questions are central to the case here presented as questions that have been determined with conflicting results in different federal circuits that have been confronted with the controversy.

Decisions in the third, fifth and ninth circuits differ significantly from the first circuit decision in this case.

If this Supreme Court were to decide that the decision of the first circuit is correct, the petitioner contends that the decision in *Cafeteria Workers* is unconstitutional, and submits this contention as a question to review.

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III. TABLE OF AUTHORITIES

Cases cited:	Serrano vs. United States	709 F2° 104
	Tokar vs. Hearne	699 F2° 753
	Bridges vs Davis	443 F2° 970
	The Committee to Free the Fort Dix 38 vs. Collins	429 F2° 807
and	Cafeteria Workers vs. McElroy	284 F2° 187 81 SCt 1743

IV. OPINION BELOW AND JURISDICTION

Petitioner submits for review the decision and opinion of the US Court of Appeals for the first circuit in case No. 82-1702, the memorandum and order in that same case dated 13 June 1983, and the decision and opinion of the US Court of Appeals for the first circuit in case No. 84-1644, dated 27 March 1985. This latter case is the final decision after the remand of the first decision, and together constitute the final decision.

On 15 June 1985 petitioner requested an extension of time to file a petition for a writ of certiorari. This request was granted by Justice Brennan on 18 June 1985, granting an extension to 25 July 1985 to submit this petition.

Jurisdiction of this Supreme Court to hear this petition is granted by 28 USC 1254 as a review of a judgment of a United States Court of Appeals.

V. STATEMENT OF THE CASE

In January 1978, Andres Serrano Medina had worked for 15 years as a cook in the cafeteria of the Antilles Consolidated School System at Roosevelt Roads, Puerto Rico, as a non-

School System at Roosevelt Roads, Puerto Rico, a non-appropriated fund facility of the US Naval Station. He also owned and operated a taxi during non-school hours; this was licensed by the Public Service Commission of Puerto Rico and authorized by the base commander to operate on the Naval Station.

On the night of 8 January 1978, Serrano, accompanied by his brother, Jose Serrano Medina, carried a US Marine passenger from a local bar to the Marine barracks on the base. He entered the base showing his taxi ID card. His light blue taxi was in the repair shop so he was driving his wife's personal red Chevrolet.

As the taxi approached the Marine barracks, he was cut off by another car. Three men, later identified as Navy security agent Lykins, Alston and Stoner, approached the car and ordered everyone out. They body-searched all three, Serrano and his brother were clean, the Marine had three packets of marijuana. The agents asked Serrano to sign a release to search his car. He signed the release; they searched and declared it clean. Next the agents showed a paper bag they claimed to have found under the right side of the taxi. Serrano and his brother were asked if they knew anything about the bag, both denied any knowledge.

Serrano was asked for his ID card. As he gave his Navi taxi ID, the agent also asked for a second ID that he had noticed in Serrano's wallet. This was Serrano's ID as a cook. Entrance to the base is controlled by ID cards that specify areas and hours. Serrano legitimately had two cards for his two authorizations to be on the base.

The school ID had just been issued, his picture showed him with a full beard, just as he had that night. The taxi ID was a recent reissue of a two-year-old card that showed him to be clean shaven.

The agents confiscated both cards and turned Serrano to the Puerto Rico police, charging him as a drug distributor.

On 17 January, Serrano went with an attorney to ask the commanding officer to return his ID cards so that he might work while the charges in Puerto Rico courts were pending. He told the commanding officer that he knew nothing of the marijuana found on the Marine or the bag supposedly found under the car. The commanding officer refused to return the ID cards and refused to discuss while the court charges were pending. He also told Serrano that he was guilty of felony fraud against the United States because the ID cards were different.

On 31 March 1978 the commanding officer issued a permanent barment order.

In May the state case against Serrano was dismissed after repeated failure of the Navy security agents to appear to testify.

Meanwhile, in April 1978, Navy filed criminal charges of drug distribution against Serrano in US District Court. Unrelated to the earlier incident, these charges were based on statements by two white high school students at the base school where Serrano worked as a cook. They alleged that Serrano had sold marijuana to them, even though he had not been on the base for three months. Investigation in defense of Serrano showed that one of those students was himself actually the primary marijuana distributor in the school. Navy security agents had saved him from a beating by a customer that he had cheated. Under questioning, he named Serrano as his source, most likely to avoid the consequences of naming his actual source.

The student was named Stoner, he is the son of one of the agents who had arrested Serrano in the January incident.

This information was given to the US attorney, who shortly afterward requested dismissal of the case against Serrano, which was granted.

Understanding the facts of this case require identification of the main actors:

Andres Serrano Medina, plaintiff/petitioner
Jose Serrano Medina, brother of Andres, a disabled Vietnam veteran
Jose Medina, a known drug dealer who is a half-brother of Andres Serrano Medina and Jose Serrano Medina.
James Stoner, Navy security agent
Charles Alston, Navy security agent
Anthony Lykins, Navy security agent
Stoner Jr., high school student at the base.

At the time of this case, Navy was investigating drug sales on the base. According to official reports, on the night of Serrano's arrest, Navy was looking for a man called "Junior" who drives a red taxi. In the report of Serrano's arrest, it is claimed that Serrano was known as "Tole," which is correct, and further states that "Tole" is Spanish for "Junior." This is completely wrong, it also demonstrates that the Navy agents were illiterate in Spanish, in an area where Spanish is the primary language.

Navy security was looking for a red taxi; Serrano had a blue taxi, but that night he was driving his wife's red car, the only time he entered the base with a red car.

Serrano has a half-brother, Jose Medina, son of his mother before she married Serrano's father. Jose Medina is known as "Junior" and drove a red taxi. He was a known drug dealer, although he had never been charged or convicted.

It was obvious that the agents were looking for Jose Medina, Serrano's half-brother, on the night of 8 January 1978. This person was not the brother in the car, who was Jose Serrano Medina, nor was he Andres Serrano Medina, he was a completely different person.

Andres Serrano Medina has never been involved, in fact or by reputation, in any aspects of drugs. Since the incidents of 1978, which cost him his job as a cook and his taxi business, Andres Serrano Medina has declared his innocence of all criminal

charges and maintained that the Navy arrest action was directed against his half-brother, Jose Medina. No denial of this claim has ever been made, directly or indirectly, by Navy.

With both state and federal cases dismissed, Serrano requested the return of his ID cards so that he could return to work. The commanding officer refused, stating as a reason that Serrano was guilty of felony fraud against the United States because of the differences on the ID card pictures and because he was named Andres Serrano on one card and Andres Serrano Medina (Medina is his mother's name) on the other. The IDs were made by the Navy, and were at all times the property of the Navy.

With this final refusal of the commanding officer to lift the barment order, Serrano filed suit in US District Court with a claim for lost wages, reinstatement in his job and taxi business, and reversal of the barment order. The suit names as defendants the United States, the commanding officer, and the Superintendent of the school system.

Navy refused most discovery, except for a statement by the commanding officer that is in the record. It is a long statement within which he admits that he lied to Serrano about the reason for the bar order ". . . although my correspondence to plaintiff and his attorney indicated that the reason for his disbarment . . . was fraudulent possession of two ID cards . . . the real reason was that . . . although he was cleared of all charges at a court hearing . . . I was still convinced that he was selling marijuana . . ."

In US District Court, Serrano's claim against the commanding officer was dismissed because ". . . this court has no power to review a commanding officer's barment order . . ." This initial decision also dismissed the case against the school superintendent.

Andres Serrano Medina appealed to the United States Court of Appeals for the First Circuit. The first circuit affirmed the dismissal against the commanding officer on an Order and Opinion dated 10 May 1983, reported at 709 ° 104. The first

circuit decision cites *Cafeteria Workers vs. McElroy, 81 SCt 1743,* ". . . *the language in Cafeteria Workers* indicates that the factual basis behind the commander's allegations is not subject to judicial scrutiny . . . to delve into the truth or falsity of the facts behind this exclusion would be to require the very hearing that appellant has been found not entitled to. . . " 709 F2° at 109.

The Order and Opinion of the first circuit contained significant errors of fact, errors which formed the basis for the affirmation of the original District Court decision. This original Order and Opinion is included in the appendix as originally issued. Serrano filed for rehearing, pointing out the following errors of fact in that Order and Opinion and arguing that if the Court had not confused the identities of Jose Serrano Medina and Jose Medina it would not have decided against appellant in his claim that the incident of the Marine and that of the two high school students were both cases of mistaken identity and that the commanding officer's barment order was completely wrong:

Error No. 1 - on page 2 of the opinion it reads "His half-brothere, Jose Medina, was also in the car."

This is not true, the Navy agrees that his *brother*, Jose Serrano Medina, was in the car.

Error No. 2 - on page 16 of the opinion read "The circumstances were plainly suspicious; Serrano was accompanied in his taxi not only by a passenger who possessed marijuana but by a half-brother widely identified as dealing in drugs who apparently tried to get rid of some marijuana when the stop occurred."

This is not true. It was not the drug-dealing half-brother in the car but the disabled Vietnam veteran brother.

Error No. 3 - on the same page 16 read "While a taxi driver might not always be expected to vouch for every passenger, the presence of his half-brother in the taxi puts matters in a different light."

> This squarely bases the decision on the presence of a drug-dealing half-brother in the taxi, an error which founds the decision on an untrue fact.

The US Court of Appeals for the First Circuit denied the petition for rehearing and changed the original Opinion in Memorandum and Order dated 13 June 1983, reproduced entirely in the appendix of this petition.

The Memorandum amended the opinion as follows:

1) The sentence beginning on line 13 of page is changed to "His brother, Jose Serrano Medina, was also in the car."
2) On page 16, lines 8, 9 and 10 from the bottom are changed to "passenger who possessed marijuana but by his brother, who apparently tried to get rid of some marijuana when the stop occurred."
3) In line 6 from the bottom of page 16, "half-brother" is changed to "brother."

The amendments appear in the published record 709 F2° at page 105, line 28, page 119(7), line 15, and page 110(7), line 24, respectively.

These changes destroy the reasoning of the US Court of Appeals. The brother in the car was not identified as dealing in drugs, he is a disabled Vietnam war veteran with an outstanding record of service to his country. This substitution of a known drug dealer for an honorable brother removes completely from the first circuit's decision the "adequate support" credited to the Navy position.

Petitioner presents this to show that if he had been given due process it is quite probable that the barment would have been reversed.

The first circuit opinion also remanded the case to District Court to review the case against the school superintendent. The US District Court then dismissed the case against the school superintendent. Andres Serrano Medina returned to the US Court of Appeals for the first circuit, which affirmed the final dismissal on 27 March 1985.

Now the only recourse for justice is to the US Supreme Court.

VI. REASONS THAT THE SUPREME COURT SHOULD HEAR THIS CASE

The Supreme Court should hear this case for the following reasons:

1. The case presents a controversy over a conflict of rights that are in themselves fundamental, the constitutionally guaranteed right of every individual to due process, and the right and duty of the military to defend the United States.
2. The US Supreme Court leading case of *Cafeteria Workers* is cited as controlling by the courts that have heard cases over the authority of a commanding officer to bar civilians from his command and the right of those persons who have been barred. The various circuit courts of appeals have decided cases with significant variation in the interpretation of the criteria to be applied as it is defined in *Cafeteria Workers*. These differences between the circuits have caused the resulting judgments to vary depending on the circuit of venue. This difference must be resolved by the Supreme Court in this case to ensure even justice to all.

VII. ARGUMENT

Petitioner presents the following arguments:

- *that the US court of Appeals for the First Circuit, in the case here presented for a writ of certiorari, has interpreted the leading case of *Cafeteria Workers* in an unconstitutional way that is in conflict with the US Supreme Court criteria
- *that the interpretation of the US Court of Appeals for the First Circuit conflicts with interpretations of the same case in the third, fifth and ninth circuits
- *that if this Supreme Court determines that the interpretation of the First Circuit is correct, then the decision of *Cafeteria Workers* is itself inconstitutional

First Circuit interpretations: in its Opinion and Order in the case of Serrano, the First Circuit finds that the discretion of the commanding officer is absolute, that a decision by a commanding officer to bar a civilian is not subject to judicial scrutiny, and that "... to delve into the truth or falsity of the facts behind the exclusion would require the very hearing that the appelant has been found not entitled to ..." *Serrano vs United States, et al.* 709 ° at 109.

The First Circuit found that Andres Serrano Medina had been denied due process but decided that the District Court was correct in determining that "... appelant's involvement in drug sales is adequately supported ..." This decision loses all logic when both the District Court and the Circuit Court find factual support for the decision because the "drug-dealing" half-brother was present in the taxi, and then maintain that conclusion when it is pointed out that official Navy reports of the incident state that the other person in the taxi was the disabled Vietnam veteran brother, not the drug-dealing half-brother.

In *Cafeteria Workers* the Supreme Court decided that the court could accept the reason given by the commanding officer that the barment was for "failure to meet security requirements," and that the court should not inquire into the facts that led the commanding officer to reach that decision.

In Serrano's case, the court has been made aware of two sets of facts. One set of facts shows that the person barred is not the person that the commanding officer was intending to bar; the other set of facts is a series of allegations proven false, suspiciously akin to a coverup of incompetent or discriminatory security agents. The commanding officer is not claiming to withhold the facts, he presents his reasons and his facts.

Petitioner respectfully argues that if the commanding officer declares the facts that supported his reasoning, he waives any right to immunity from judicial scrutiny.

This position does not impugn the authority of the commanding officer to bar entrance to his base, nor does it contest the immunity of the decision to judicial review when the commanding officer states that his decision is based on security interests. But once conflicting reasons, different sets of facts, are presented to the court, there is a right to due process to determine the truth.

Petitioner submits that the restriction of judicial review imposed by *Cafeteria Workers* is set forth in that decision as being quite narrow, intended only to place limits within the pinpointed issue of security.

Therefore, based on the record, the interpretation of the First Circuit in this case does not conform to the criteria of *Cafeteria Workers* and actually violates the constitutional protection retained in *Cafeteria Workers* and must be reversed.

Conflict with other circuits: in Serrano's case, the court found that a barment decision is not subject to judicial review, confirming the District Court decision to deny all due process. In the Opinion and Order the court stated that with respect to the appelant's contention that he had received no due process, no notice or hearing, "... it is quite clear that he received neither..." 709 F2° at 108.

The US Court of Appeals for the *Fifth Circuit*, citing *Cafeteria Workers*, found that a commanding officer's decision to bar a civilian was supported by the evidence, after the District Court had conducted a *trial on the merits*. *Tokar vs Hearne* 699 F2° 753, at 755.

The Fifth Circuit Court permits judicial review, the First Circuit does not. This means that if Andres Serrano Medina lived in the fifth circuit instead of the first circuit, he would quite probably still be a federal employee.

The US Court of Appeals for the *Ninth Circuit* decided that "... although the scope of review in cases such as this involving military matters is extremely limited, that does not mean that any military action is beyond the reach of the courts. Therefore, in a strict sense the orders before us are not nonreviewable. The phrase nonreviewability is properly ascribed to the scope of the review, rather than the jurisdiction to review ... *Bridges vs Davis* 443 F2°, Ninth Circuit, 1971.

The position of the ninth circuit is contrary to that of the first circuit where judicial review is effectively denied.

In the *Third Circuit*, the US Court of Appeals reviews the dismissal of a complaint that challenged the decision of the commanding officer to bar civilians. The court states "... Since this came to as a result of a dismissal of the complaint, we assume for the purpose of review that the facts alleged in the complaint are true ..." *The Committee to Free the Fort Dix 38 vs Collins*, 429 F2° 807.

In Serrano, the First Circuit considers it is reviewing a summary judgment, because "... these conclusions are based ... in part on submissions outside the pleadings ..." and that therefore we may affirm "... only if, looking at the record in the light most favorable to the appelant, there is no genuine issue of material fact ..."

Andres Serrano Medina's claim of mistaken identity was raised at every opportunity, particularly in the written and oral arguments opposing summary judgment in District Court, and the brief and oral arguments before the First Circuit. Based on these submissions in the record, the First Circuit could not have looked at the record in the light most favorable to appelant, did not consider for purpose of review that the facts shown by appellant are true. This constitutes a decision as to what 'facts' to use to decide the case. A decision as to which 'facts' to use is a decision that is contrary to the position of the third circuit.

Petitioner presents these cases to show that Serrano would most probably have been reviewed to determine the validity of the commander's decision if it had occurred in the third, fifth or ninth circuits.

Presuming that his claim of mistaken identity prevailed, Serrano would still have his full time job as a cook and his business as a taxi.

These inconsistencies destroy the integrity of our federal system of justice and must be resolved.

Cafeteria Workers

In *Cafeteria Workers* the Supreme Court draws a line between the barring of a civilian with a constitutional right violated by the barment, and the civilian with no such right. In both the court upholds the authority of the commanding officer to bar but limits judicial scrutiny of the barment order to that person who possessed a right that was violated. However, in the real world, such review has been quite limited, with no significant difference between the review accorded the two classes of civilians.

Cafeteria Workers describes a criteria of flexibility in determining the due process rights, and then decides that for Rachel Brawner, the cafeteria cook of that case, that no due process is required.

Petitioner notes that *Cafeteria Workers* was decided with subtle but powerful external considerations that are not apparent from the text of the decision.

The plaintiff/appellant in *Cafeteria Workers* was the AFL-CIO, not the cook who had been deined entrance to the base. The issue was not only the reviewability of the bar order, but was as much a contest between the Navy and AFL-CIO as to who would be the boss on the military base.

After the bar order, the union instituted arbitration against the contractor employer, resulting in a decision clearing the contractor because he had not terminated her, and therefore the worker's grievance was not with the employer. Circuit Court Judge Danaher describes the situation to illustrate the thrust of the *Cafeteria Workers* litigation:

> "One of the arbitrators, Samuel Jaffe, Esq., of the firm of Jaffe and Danau, dissented from the arbitration award. He argued in his dissent against the determination by those in the command that Mrs. Brawner did not meet "... basic requirements and thus her pass was revoked..." He pointed out that there is ". . . NO GREATER THREAT TO THE VERY EXISTENCE OF A LABOR ORGANIZATION, THAN TO PERMIT AN EMPLOYER THE UNILATERAL ACTION IT HAS INDULGED IN HERE . . ." (emphasis added by the Appeals Court in banc) *Cafeteria Workers, et al,* at 284 F2° 187.

The Appeals Court sitting in division of three judges adopted the position of Mr. Jaffe that the Navy could not unilaterally dismiss an employee, that the union had to participate. Voting two to one, the Court reversed the District Court dismissal. Defendant United States then requested a rehearing en banc of the three-judge decision. This resulted in a five to four vote to reverse the earlier two-to-one vote of the Appeal sitting division.

The most pertinent part of that decision is in Judge Danaher's concurring opinion: (285 F2° 187)

> "never to my knowledge had there been such a challenge to the Government's right to protect its own Navy installations."

It is clear that the basic issue in *Cafeteria Workers* was not the civil rights of the cafeteria cook, the issue was whether the Government or the union would decide who works on a Government installation.

Petitioner contends that the influence of the union pressure distorted the case decision beyond the civil rights issue.

Within this perceived context of *Cafeteria Workers*, petitioner argues that a correct interpretation of *Cafeteria Workers* and its progeny is that the power of the commanding officer to bar civilians is essentially absolute, but it is always subject to judicial scrutiny to ensure that the decision is fair and reasonable.

In this context, petitioner believes that *Cafeteria Workers* is constitutional. If, however, the Supreme Court decides that the commanding officer is shielded from judicial scrutiny in all but the most blatant, scandalous examples of injustice, then the decision in *Cafeteria Workers* is not constitutional. A single exception would be the claim of a commanding officer that the action was founded on reasons of security. Any order not so based should be considered as an action of police power, and as such subject to the same constitutional restraints as any police action.

VIII. *Conclusion*

Petitioner contends that the court decisions in at least four circuits, the first, third, fifth and ninth, differ substantially, that the same case heard in these districts would result in different judgments and that disparate results are repugnant to our federal system of justice.

Petitioner further contends that a correct interpretation of the position of the federal court on barment controversies is that unless the case is frivolous on its face, the only procedure to determine the impugnation of a barment order is trial on the merits to determine if a case exists.

If this position conflicts with the criteria of *Cafeteria Workers*, then the *Cafeteria Workers* position is on the wrong side of the constitution, and must be revoked or modified.

FOR ALL THESE REASONS petitioner most respectfully submits that this case illustrates a serious discrepancy between the circuit courts on this important issue and that this case is a propitious set of facts quite apt to utilize in resolving these differences.

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I certify that copies of this petition have been sent by pre-paid mail to the Solicitor General of the United States.

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APPENDIX

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

82-1702

UNITED STATES COURT OF APPEALS

ANDRES SERRANO MEDINA,

Plaintiff, Appellant

v.

UNITED STATES OF AMERICA, ET AL

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen Cosuelo Cererezo, U.S.District Judge]

Before

Coffin, Circuit Judge,

Campbell and Bownes, Circuit Judges.

Robert J. Walser, for appellant.

Alex H. Adkins Trial Attorney, Department of the Navy, with whom Daniel Lopez Romo, United States Attorney, and Osvaldo Carlo Linares, Assistant United States Attorney, were on brief, for appellees.

May 10, 1983

CAMPBELL, Chief Judge. Appellant Andres Serrano Medina ("Serrano") is a taxi driver and former cook for the Antilles Consolidated School System at the United States Naval Station, Roosevelt Roads, Puerto Rico. Because of the revocation of his permit to enter the Naval Station, he lost his job as a cook and his right to operate his taxi on the base. He brought this suit against the base commander, the United States, and the school system seeking reinstatement, back pay, reissue of his identification cards, and relief from the debarment order. The district court granted summary judgement for the defendants.

On January 8, 1978, Serrano was driving a United States marine onto the base in his taxi. His half brother, Jose Medina, was also in the car. Acting on a tip, Naval security agents stopped

them. They found three small bags of marijuana on the marine, and several more under the taxi where Jose had apparently thrown them. A search of Serrano and, on his written consent, the car turned up nothing. The agents asked for Serrano's Navy identification card;

when he produced it they noticed a second card in his wallet, which he also handed them. One card for the cook's job, the other for the taxi job. Although they had been issued only three days apart, one was a reissue of two-year old card. On one, Serrano was pictured with a beard, while on the other he was clean shaven; the height and weight figures given on the cards were

slightly inconsistent; and on one his name was given as Andres Serrano, on

the other as Andres Serrano Medina. The agents confiscated the identification cards, which were destroyed five days later, and turned Serrano and his half-brother over to the Puerto Rico police.

A week later, Serrano and his attorney met briefly with the executive officer of the Naval Station, [1]Ward Serig, in an effort to obtain return of the cards, without which Serrano could not enter the base. Serig refused to discuss the matter until the criminal action was resolved. On March 30, while the Puerto Rico criminal charges were still pending, he issued a letter permanently barring Serrano from the base.[2]

---

1. The executive officer is the second in command at the Station. For present purposes, we shall consider his authority

coextensive with that of the commanding officer, from whom reposibility for this matter was delegated.

2. The letter read, in part,

> On January 1978 you were apprehended by the Naval Station Security Department when a substantial amount of marijuana was discovered in the Naval Station. You were also in possession of two civilian worker's identification cards issued to you on 19 and 22 August 1977. Both identification cards were found to bear your photograph although they were filed under different names and contained dissimilar descriptions of your physical characteristics. This is in violation of Naval Station Regulations and constitutes an act of fraud against the United States Government.

....

As a result of your involvement

in the aforementioned incident, you are hereby barred from entering the Naval Station, Roosevelt Roads.

The complaint alleges that the debarment "is the direct cause that Serrano lost his job as a cook in the school and his business as a taxi driver."

Criminal charges arising out of the January incident were brought in Puerto Rico court. In April, the Navy also brought charges against Serrano in federal court when statements by high school students on the base implicated him in further drug transactions.

In may, after several continuances, the Puerto Rico action was dismissed. The United States Attorney later requested dismissal of the federal charges, which was granted in July.

On November 7, and again on November 27, Serrano's attorney requested in writing the return of the identification cards; this was refused by a letter

from the commanding officer dated December 1, 1978. The letter acknowledged that Serrano had "been absolved of any guilt in the [criminal] charges," but asserted that he "remained guilty" of fraud against the government in possessing inconsistent identification cards. It reiterated as a trespasser if he were observed thereon. A week later Serrano's attorney sent a letter requesting a meeting with the commanding officer; this was refused. Finally,

on December 15, Serrano and his attorney went to the base in an effort to speak with the commanding officer. They were denied admission. This followed in

January 1979.

I.

Several of appellant's arguments may be quickly rejected. First, Serrano claims he should have been allowed to amend his complaint. The district court did allow the complaint to be amended once, in October 1979. More than two years after the original complaint had been filed, in March 1981, Serrano moved to amend again by adding a number of new defendants in support of a conspiracy theory. The motion was denied. Serrano now appeals from that ruling, describing it as a denial of due process.

We find no error in the court's denial of leave to amend. Plaintiff's motion was unduly delayed. He claims that he was not aware of the extent of or participants in the alleged cons-

piracy until mid-1980. Yet the alleged conspirators were the commander of the base and the agents who stopped Serrano's car. As early as February 1979 they had been summoned as witnesses in the Puerto Rico criminal action. Serrano states that after he discovered the conspiracy he was still obliged to put off any amendment because of "an intolerable personal situation," viz., fear that amendment of the complaint and subsequent discovery would implicate his half-brother and subject him to criminal prosecution. Only once the

statute of limitations had run on the criminal offense did Serrano seek leave to amend the complaint. We do not think his desire to hide the criminal behavior of his half brother provided any proper

justification for the further period of delay. See Hayes v. New England Millwork Distributors, Inc., 602 F.2d 15, 19-20 (1st Cir. 1979). The district court was entitled to believe that allowance of the eleventh hour amendment would result in undue prejudice to the defendants as it added new parties (at least some of whom were no longer even in Puerto Rico), and by raising new and separate claims would require additional research and discovery. We find no abuse of discretion. See Johnston v. Holiday Inns., 595 F2d 890, 896 (1st Cir. 1979) (denial of leave to amend shall be reversed only for abuse of discretion).

The district court also properly found that it lacked jurisdiction over the claims, all for money damages, against the United States. No contractual claim

can be made out under the Tucker Act, 28 U.S.C. S 1346(a)(2), as the United States is not a party to the collective bargaining agreement, the only contract invlolved, and Serrano was paid out of nonappropriated funds. See generally Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942); H.R. Rep. No. 933, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3477, 3478-79. Nor can Serrano recover in tort under section

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1346(b). Debarment from a military installation falls within the discretionary function exceptionto the Federal Tort Claims Act. See 28 U.S.C. S 2680(a) Kiiskila v. United States, 466 F.2d 626, 628 (7th Cir. 1972).

It is also clear that the district court properly dismissed Serrano's claim under 42 U.S.C. S 1985. The complaint

does not mention a conspiracy or state facts from which the existance of a conspiracy might be inferred. See Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971).

II.

This bring us to Serrano's principal allegations: that the debarment involved a denial of due process and was so arbitrary that it cannot stand. The district court found that no liberty or property interest existed to trigger due process protections, and that the debarment was not patently arbitrary.

Because these conclutions were necessarily based in part on submissions outside the pleadings, we treat the decision below as a grant of summary judgement. See Fed. R. Civ. P. 12(b), (c); id. 56. We may affirm only if, looking at the record

in the light most favorable to appellant, there is no genuine issue of material fact and appellee is entitled to judgement as a matter of law. E.g., Hahn v. Sargent, 523 F.2d 461,464 (1st Cir. 1975), cert. denied. 425 U.S. 904 (1976) .

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A. Military Discretion

Our law has accorded significant autonomy to the military with respect to civilian and judicial interference. The military "constitutes a specialized community governed by a separate discipline from that of the civilian," Orloff v. Willoughby, 345 U.S. 8394 (1953). The "overriding demands of discipline and duty" render it "a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743-44 (1974). See also Department of the Air Force v. Rose, 425 U.S. 733, 743-44 (1974).

Of necessity, the military constitutes "a system that stands apart from and outside of many of the rules that govern civilian life in our country." Greer v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., Concurring).

This status creates particular tensions when the military and civilian realms conjoin. Frequently, it is the civilian that must yield to the military, for "the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." Brown v. Glines, 444 U.S. 348, 360 (1980) (upholding Air Force regulations requiring commanding officer's approval before petitions may be circulated on the base); see also Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (upholding equivalent Navy regulations): Greer v. Spock,

424 U.S. 828 (1976) (upholding exclusion of politically oriented speakers from Army base). In particular, the commanding officer of a military base has broad authority and discretion to exclude civilians from the base. Cafeteria Workers v. McElroy, 367 U.S. 886, 893 (1961); United States v. May, 622 F.2d 1000 (9th Cir.), cert. denied, 449 U.S. 984 (1980); 32 C.F.R. SS 700.702(a), 700.715; H. Moyer, Justice and the military S 4-520 at 521 (1970).

In Cafeteria Workers Rachel Brawner, a cook at the Naval Gun Factory, was relieved of her identification badge and denied access to the base, without notice or hearing, because of an unspecified failure to meet security requirements. Noting "the historically unquestioned power of a commanding officer

summarily to exclude civilians from the area of his command, "367 U.S. at 893, and the regulatory provision, still in existence, that civilians employees were to be admitted only as authorized by the commanding officer, the Court found that the commanding officer clearly had the authority to exclude Mrs. Brawner. Nor was the summary procedure a denial of due process. The Court balanced the government's traditionally unrestrained control of its own internal affairs against Mrs. Brawner's private interest in pursuing her job at that location -- "a mere privilege subject to the Executive's plenary power," id. at 895 -- and concluded that no process was due.

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The only glimmer of encouragement in Cafeteria Workers to persons situated

like appellant occurs in its acknowledgement that state and federal governments "do not constitutionally have the complete freedom of action enjyed by private employer." Id. at 898. The Court went on to say in this regard,

> We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for the exclusion had been patently arbitrary or discriminatory--that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here entirely rational and in accord with the contract with M&M.

id. Beside the above, the Court suggested only one other circumstance giving rise to a constitutional claim --"where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." Id.

B. Due Process

Cafeteria Worker is frequently cited for the proposition that a commanding officer may summarily exclude civilians from his base. E.g., Tokar v. Hearne, 699 F.2d 753, 756 (5th Cir. 1983); United States v. Gourley, 502 F.2d 785, 786-87 (10th Cir. 1973) ("well recognized that the commander of a military installation has and must have the broad authority and discretion to summarily exclude persons therefrom"); Government of the

Canal Zone v. Brooks, 427 F2d 346, 347 (5th Cir. 1970) (well established that

commanding officer "has the right to summary exclude civilians from the installation without violating the requirements of the due process clause"); United States v. Jelinski, 411 F.2d 476, 477 (5th Cir.) (no due process violation where subject barred without notice or hearing) cert. denied, 396 U.S. 943 (1969); H. Moyer, Justice and the Military S 4-521 (1970). Despite Cafeteria Worker's clear holding and this consistent line of precedent,[3] appellant contends that he has a fifth amendment right to notice and a hearing before being disbarred. It is quite clear that he received neither. However, we agree with the district court that he had no right there to. This case is squarely within the explicit holding of Cafeteria

3. The one possible exception to this line of cases that we have found is Kiiskila v. United States, 433 F.2d 745 (7th Cir. 1970) (en banc). which found a bar order invalid because it was issued in response to Kiiskila's exercise of her first amendment rights. The court stated in dictum that "[a] absent explicit authorization, a military commander may not exclude a civilian employee from a military installation without a hearing." Id. at 747 n.1. (citing Cafeteria Workers). Even if this were true, such explicit authorization may be assumed to exist here as the relevant regulations are exactly those relied on by the Court in Cafeteria

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Workers and its progeny.[4]

It is true that due process jurisprudence has gone significant changes

since Cafeteria Workers, which was decide in 1960, and that that case makes use of the right/privilege distinction subsequently abandoned by the Court. Compare Cafeteria Workers, 367 U.S. at 895, with Board of Regents v. Roth, 408 U.S. 564,571 & n.9 (1972). Nonetheless, the factors that persuaded the Court that presence on the base was a mere "privilege" persuade us that Serrano did not have a "legitimate claim of entitlement" to continued admission to the base. No statute, regulation, or contract appears to establish such an entitlement. See generally Perkins v. Board of Directors, 686 F.2d 49 (1st Cir. 1982). To the contrary, admission to the base is contigent on the commanding officer's authorization. See 32 C.F.R. SS 700.714, 700.715. The commanding officer's responsibility is "absolute," and his "authority...is commensurate with his responsibil-

ity." Id. S700.702(a). Nor is there any allegation of a de facto system of continuing admission. See Beitzel v. Jeffrey, 643 F.2d 870 (1st Cir. 1981). We therefore think that the

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4. Appellant argues that Cafeteria Workers applies only when the debarment is based on security concerns. The distinction is hardly helpful here--keeping drugs off base may be as much a "security" concern as keeping out spies. Nothing in Cafeteria Workers or subsequent case law suggests that the commander's authority is less extensive in situations not involving classified information. See Toker v. Hearne, 699 F.2d at 757.

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district court correctly concluded that Serrano enjoyed no property right requir-

ing the protections of due process. See Bleeker v. Dukakis, 665 F2d 401 (1st Cir. 1981).

Appellant asserts, however, that he has at least a liberty interest, affected by his disbarment, requiring due process protection. While a public charge of drug selling is the sort of serious charge that might infringe upon a liberty interest, see Ventetuolo v. Burke, 596 F.2d 476, 484 & n.13 (1st Cir. 1979), this charge was never specifically articulated or made public, see id. As the district court noted, Navy regulations protect personnel records from public disclosure, and there is no evidence of public stigma here, Harrington v. United States, 673 F.2d 7, 11 (1st Cir. 1982).

We do not believe the district court erred in finding that there was

no protected interest infringed by appellant's summary debarment. While the commanding officer or his subordinate might have handled the incident with greater fairness and tact, the power to exclude civilians aummarily has been acknowledged by almost every court to consider the matter. And for good reason, as it "is a necessary concomitant of thebasic function of a military installation," Greer v. Spock, 424 U.S. at 838, and "of the commander's duty to maintain the order, security, and discipline necessary to military operations," United States v. Gourley, 502 F.2d at 786-87.

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C. Arbitrariness

Although appellant had no right to continued admission to the base, he could not have been excluded for reasons that were patently arbitrary

or discriminatory; for example, on the grounds of race or religion. See Cafeteria Workers, 367 U.S. at 897-98; Weiman v. Updegraff, 344 U.S. 183, 192 (1952). The same standards would not apply if it appeared that appellant had been excluded for the exercise of first amendment or other constitutional rights. See, e.g., Flower v. United States, 407 U.S. 197 (1972); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970) (en banc). However, the only claimed arbitrariness here is the lack of an adequate factual basis for the exclusion.

The language in Cafeteria Workers indicates that the factual basis behind the commander's allegations is not subject to judicial scrutiny. The Court was not willing to look behind the "announced grounds" for the exclusion; it upheld the exclusion because "the reason advanced" was "entirely rational."

367 U.S. at 898 (emphasis added). Thus, Cafeteria Workers would seem, at most, to allow us only to "question whether the allegations, assumed to be true, are such as would constitutionally permit an exclusion order to stand; that is, whether the assumed facts may constitutionally be the basis for the judgement that"Serrano merits exclusion. Lieberman, Cafeteria Workers Revisited; Does the Commander

Have Plenary Power to Control Access to his Base, 25 JAG J. 53,56 (1970).

To delve into the truth or falsity of the facts behind the exclusion would be to require the very hearing that appellant has been found not entitled to.

It is true that circuit court decisions subsequent to Cafeteria Workers have often seemed willing to question, within limits, not only whether the

asserted reason for exclusion is sufficient but also whether that reason has a basis in fact. They phrase the issue as whether the exclusion itself, not just the proffered reason, is patently arbitrary or discriminatory. See, e.g., United States v. May, 622 F.2d at 1006; Bridges v. Davis 443 F.2d 970, 973 (9th Cir. 1971) (scope of review in challenge to debarment "extremely limited," but commander's wide discretion does not extend to patently arbitrary or discriminatory exclusions), cert. denied, 405 U.S. 919 (1972); Committee to Free the Fort Dix 38 v. Collins 429 F.2d 807, 811 (3d Cir. 1970); Weissman v. United States, 387 F.2d 271, 273 (10th Cir. 1967) ("The question...is whether the order was rational."); Lloyd, Unlawful Entry and Re-entry into Military Reservations in Violation of 18 U.S.C. S 1382, 53

Mil. L. Rev. 136, 142 (1971) (bar can not be "arbitrary or capricious," citing Digs. Ops. JAG 1912, p. 267). Indeed, in the most recent of these cases the plaintiff received a full bench trial on the merits. The district court concluded the bar order was reasonable, and

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the circuit court agreed that "there was ample evidence to support [the commander's] actions." Tokar v. Hearne, 699 F.2d at 757.

We need not now decide whether this willingness to look at the underlying factual support for a bar order is proper. The district court here determined that the commanding officer "had valid grounds for suspecting plaintiff and for deciding that it was best for his command area that he be excluded therefrom." Though the question is

fairly close, the record revealing more than a little confusion on the part of the Navy, we would agree with the district court. The charge of identification card fraud seems insubstantial, but the concern as to appellant's involvement in drug sales is adequately supported. The circumstances were plainly suspicious; Serrano was accompanied In his taxi not only by a passenger who possessed marijuana but by a half-brother widely identified as dealing in drugs who apparently tried to get rid of some marijuana when the stop occurred. While a taxi driver might not always be expected to vouch for every passenger, the presence of his half-brother in the taxi put matters in a different light. The record also contains three sworn statements by separte individuals identifying appellant as a drug supplier. A base commander

has wide discretion as to whom he may exclude from the base, and there is evidence in the form of the current regulationsthat the

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military was deeply troubled by the trafficking in drugs on bases. We cannot say the exclusion of plaintiff in these circumstances was patently arbitrary or discriminatory. See Bridges v. Davis, 433 F.2d at 974 (Koelsch, J., concurring) ("substantial proof of actual misconduct" not required; bar orders should stand "even though the result of gossip and unconfirmed rumor").

III.

The complaint named not only the United States and the base commander as defendants, but also the school system in whose cafeteria Serrano had been employed. Appellant states that regardless of the outcome of his action against the United States, he has an independent and viable action against the school system for back pay and reemployment, if only at another facility. The district court did not address this claim in its opinion. It did, however, dismiss the action "as to all defendants."

It is not easy to discern the legal theory or factual basis on which appellant seeks to proceed against the school system. He does allege a breach of the collective bargaining agreement between the school system and his union. Yet the provision of the agreement to

which he cites does not seem to exist. Moreover, in his brief he asserts that the agreement "expired on 25 August 1977, had not been renewed or otherwise kept in force, and was not in effect during any of the time

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period of this case." Adding to the confusion is the fact that the school system itself denies that Serrano was even discharged.

Notwithstanding the above, and without meaning to intimate that the claim has any merit, we do not at this time sustain the dismissal as to the claim against the school system arising out of the employment relationship.

The district court did not discuss the matter in its opinion, and we think Serrano should have an opportunity to justify the claim, if he can, upon a proper motion for summary judgement

focusing on that issue. Accordingly while affirming the district court's judgement in ail other respects, we vacate and remand as to so much of it as dismisses Serrano's claim for back pay from and reemployment in the school system.

So ordered.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1702

ANDRES SERRANO MEDINA

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants, Appellees,

Before

Campbell, Chief Judge

Coffin and Bowes, Circuit Judges.

MEMORANDUM AND ORDER

Entered June 13, 1983

The petition for the rehearing is denied. The opinion is amended as follows:

1) The sentence beginning on line 13 of page 2 is changed to "His

brother, Jose Serrano Medina, was also in the car."

2) On page 16, line 8, 9, and 10 from the bottom are changed to "passenger who possessed marijuana but by his brother, who apparently tried to get rid of some marijuana when the stop occurred. While a taxi...."

3) In line 6 from the bottom on page 16, "half-brother is changed to "brother."

By the Court,

Francis P. Scigliano

Clerk.

[cc: Messrs. Walser and Adkins

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 84-1644

ANDRES SERRANO MEDINA,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon.Carmen C. Cerezo, U.S. DistrictJudge]

Before

Coffin, Circuit Judged

Wisdom, *Senior Circuit Judge.

and Bownes, Circuit Judge.

Robert J. Walser for appellant.

Osvaldo Carlo Linares, assistant United

States Attorney, with whom Daniel F. Lopez Romo, United States Attorny, was no brief for appellees.

March 27, 1985

Per curiam. Appellant, Andres Serrano Medina, challenges a grant of summary judgement, dismissing his claim that appelee, the Antilles Consolidated School System, had terminated his employment as a cook without cause and thereby violated his due process rights. For the reasons outlined below, we affirm district court's decision.

The district court entertained cross-motions for summary judgement in response to our earlier decision in this case, Serrano Medina v. United States, 709 F.2d 104 (ist Cir. 1983). There we upheld the district court's dismissal of appellant's primary claim, which was that the commanding officer of the United States Naval Station at Roosevelt Roads, Puerto Rico, had violated appellant's due process and equal protectionrights by permanently barring him

from the naval station. Id. at 108-110. For a number of years preceding the issuance of the bar order, appellant had worked at the naval station in two capacities, as an independent taxi driver and as a cook for the school system. Although not unsympathetic to appellant's plight, we held that the commanding officer's exclusion of appellant from the naval station had neither violated his constitutional rights nor been "arbi - trary or discriminatory."[1] Id.

At the same time, we remanded for further consideration what

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1. Having rejected the claim against the commanding officer in our earlier decision, we find that part of appellant's brief which concerns the facts underlying the bar order largely, if not entirely, irrelevant at this juncture. For a complete summary of these facts,

see Serrano Medina v. United States, 709 F.2d 104, 105-106 (1st Cir.

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appeared to be a possible secondary claim against the school system,[2] which operates as a somewhat autonomous entity at this and two other military bases. While we noted that "it was not easy to discern the legal theory or factual basis on which appellant seeks to proceed against the school system" for back pay and re-employment, we thought it best that the district court give appellant an opportunity to justify what ever claim he might have. Id. at 110.

After considering the cross-motions for summary judgement that were subsequently filed, the district court dismissed appellant's claim against the school system for a number of reasons,

including: (1) the fact that appellant was unable to point to any collective bargaining agreement, contract, or statute that required the school to prove that it had cause to terminate someone in appellant's position; (2) the fact that the school system had ample cause to terminate him in that it was impossible for him to report to work as a result of the bar order; and (3) the fact that there was no evidence that the school system had injured his reputation by publishing any defamatory statements about him.

In reviewing the district court's decision, we focus solely upon the second and third grounds, which, by themselves, are sufficient to dispose of this appeal. The evidence unmistakably shows that appellant was dismissed in large part because he was unable to report to work.

Appellant concedes both in his amended

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2. As the district court has subsequently noted, none of the specific charges set forth in the amended complaint specifically identifies the school system as the wrongdoer.

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complaint and in the "Stipulated Statement of Facts" signed by counsel for both parties that his "employment as cook in the school cafeteria [was] terminated because of the debarment order." Moreover, the termination letter itself states in pertinent part: "Due to the barment from entering Roosevelt Roads Naval Station, you became ineligible to perform the duties of your position. This may not be controverted since employees must be ready, willing and able to work."

These facts fully support the district court's conclusion that even if appellant was correct in his contention that he could only be terminated for cause, the school system had more than sufficent cause to terminate him.

Similarly, the evidence on record fully supports the district court's determination that any damage to appellant's reputation was caused not by the school system but by the commanding officer. Appellant makes no allegation, and points to no evidence which would support an allegation, that the schol system disclosed to the public any defamatory comment, evaluation, or letter.

Accordingly, the decision of the district court is affirmed.